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Supreme Court of the United States

OCTOBER TERM, 1939

NO. 124

LONNIE AVERY,

Petitioner

v.

STATE OF ALABAMA,

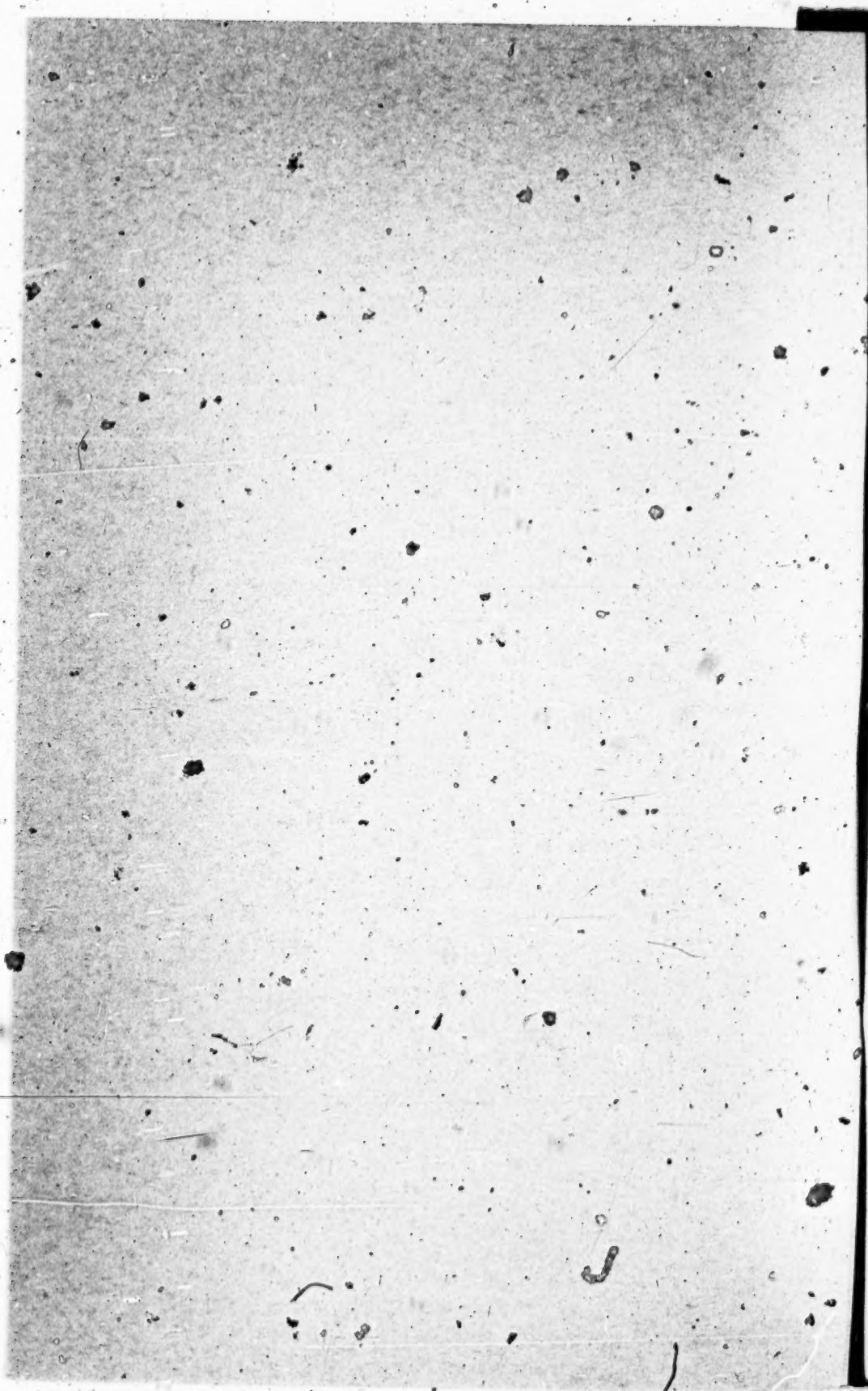
Respondent

BRIEF FOR RESPONDENT

THOMAS S. LAWSON,

Attorney General of Alabama.

WILLIAM H. LOEB
Assistant Attorney General,
On The Brief.



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OPINION OF THE COURT BELOW

I.

This case is before this Court pursuant to certiorari granted October 16, 1939. The opinion of the Supreme Court of Alabama is reported as follows; *Avery v. State of Alabama*, 188 So. 391.

The opinion of the court below appears in the record in this case on page 39. All of the Justices concurred in the opinion rendered in the court below.

II.

JURISDICTION

1. The statutory provision by which jurisdiction of this proceeding is authorized is Section 344 of Title 28, U. S. C. A. (Judicial Code, Section 237, as amended).

2. The opinion of the court below was rendered on April 27, 1939, and the fifteen days allowed for making application for rehearing in the Supreme Court of Alabama expired without such application for rehearing having been made.

3. Petitioner in his motion for continuance and in his motion for new trial as finally presented to the Trial Court claimed that he was deprived of his constitutional rights in that, (a) he was convicted without due process of law and (b) he was denied equal protection of law.

III.

STATEMENT OF THE CASE

The petitioner was indicted by a Grand Jury of Bibb County, Alabama, of the crime of murder in the first degree. The indictment was filed on October 4, 1934 (R. 1).

The petitioner was arrested in Pittsburgh, Pennsylvania, and was returned to Bibb County, Alabama, during the middle of March, 1938, a short

time before the trial of this case (R. 16). On March 21, 1938, petitioner was arraigned and, having no counsel, the Court in accordance with the provisions of Section 5567 of the Code of Ala. 1923, appointed two members of the Bar of Bibb County, Alabama to represent the defendant. The attorneys so appointed in open Court and in the presence of the defendant interposed pleas of "not guilty" and "not guilty by reason of insanity." The Court thereupon ordered that the case be tried on Wednesday, March 23, 1938, (R. 1).

The case was not reached, however, until Thursday, March 24, 1938. Prior to entering upon the trial of the case the attorneys, theretofore appointed by the Court to represent the petitioner, filed on Thursday, March 24, 1938, a motion for a continuance (R. 4). The several grounds assigned in the motion for continuance all assert that because of the alleged proximity of the date on which the Court ordered the case to be tried to the date on which counsel had been appointed, the appointed attorneys had not had a reasonable time in which to prepare the case for trial nor to investigate the facts of the case. It was further alleged in said motion that said attorneys had not had sufficient time to prepare the law of the case. The motion contained allegations that the counsel appointed to represent the petitioner were busily occupied with other cases in Court during the interim between the time of appointment and the date set for the trial. It was further alleged therein that the defendant was unable to employ counsel and that to force him to trial on March 24, 1938, under

such circumstances, denied to the defendant the right to be represented by counsel (R. 4).

Affidavits in support of the motion for continuance were filed by the appointed counsel (R. 5, 6, 7).

The record does not expressly show a ruling on the motion for continuance but it is obvious that it was not allowed as the case was tried on the same date upon which said motion was filed (R. 5, 11).

Briefly stated the evidence shows the killing of a negro woman by her husband, a negro man, more than four years before the trial.

The evidence introduced on behalf of the State consisted, in part, of three eye witnesses who testified that the deceased, defendant's estranged wife, was, on February 13, 1932, on her way, unarmed, from the home of her foster father with whom she was living at that time to the home of one Louis Snead to get a wash tub, when the defendant accosted her and shot her with a pistol as she ran. It further appears from the testimony that after he had shot her, she turned around, took two or three steps toward him and fell on her face, and while she was still lying on the ground he approached her and standing over her shot twice, hitting her in the back of the head (R. 12, 13, 14, 15). The testimony further reveals that immediately after the shooting fracas, defendant fled the scene of the crime and remained at large for more than four years, being apprehended a short time before the trial (March

24, 1938) in Pennsylvania (R. 16). At the time he was apprehended, the defendant denied that his name was Lonnie Avery or that he came from, or knew anyone in Bibb County, Alabama (R. 16).

The defendant at his trial testified for himself and did not deny the death of his wife from pistol shot wounds but rested his defense upon the theory that the killing was accidental in that deceased had a pistol which she drew from her sweater as they argued and, in his attempt to take it from her, the pistol was fired accidentally, and that when he realized she was shot he ran from the scene of the shooting. On cross-examination of the petitioner it was established that he was an ex-convict (R. 17, 18, 19).

The petitioner was found guilty of murder in the first degree by a jury of Bibb County, Alabama, on March 24, 1938 (R. 7, 30). The jury fixed his punishment at death (R. 30). Petitioner was thereupon adjudged guilty by the Court and sentenced to be electrocuted (R. 7, 8). Counsel for petitioner forthwith filed a motion to arrest and set aside the verdict and to grant the defendant a new trial, assigning several grounds in support of the motion to the effect that the verdict was contrary to the law and the evidence in the case and that the Court erred in refusing to grant the defendant a continuance (R. 9, 10). The motion for new trial was first set down for hearing on April 16, 1938, and was continued several times, finally being heard on June 30, 1938, which date was more than three

months after the petitioner was tried (R. 10). On June 30, 1938, counsel for petitioner, with leave of the Trial Court, amended their motion for a new trial by adding the following additional grounds:

"9. The defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to The Constitution of the United States of America, specifically as follows: the defendant was not given a fair, impartial and deliberate trial.

"10. The defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: The defendant was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.

"11. The defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America specifically as follows: (1) The defendant was not given a fair, impartial and deliberate trial; and (2) the defendant was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation of trial.

"12. The defendant was denied due process of law in contravention of The Fourteenth Amendment to the Constitution of the United States of America.

"13. The defendant was denied due protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States of America."

On the hearing of the motion for new trial the attorneys who had been appointed by the Court to represent the petitioner were examined by the Court and by an attorney subsequently employed by the petitioner (R. 31, 32, 33, 34, 35, 36, 37).

The Court after hearing the motion for new trial, as amended, overruled said motion to which action the counsel for petitioner excepted (R. 10). The case was then appealed to the Supreme Court of Alabama, which is the court of last resort of the State. In an opinion written by Mr. Justice Gardner and concurred in by the other Justices, the judgment of the Trial Court was affirmed. In the opinion of the Supreme Court of Alabama it was held that the petitioner had not been denied due process of law or equal protection of the law (R. 39, 40, 41). The Supreme Court of Alabama fixed June 9, 1939, as the date on which the sentence of the Trial Court should be carried out. The date for the carrying out of the sentence of the Trial Court has been changed from time to time because of the proceedings in this Court (R. 43, 44, 45, 46).

IV.

ARGUMENT.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW.

A

PETITIONER WAS GIVEN A FAIR, IMPARTIAL AND DELIBERATE TRIAL.

Peitioner's trial was in all respects held in accordance with the Constitution and statutes of the State of Alabama, which provisions are in no manner attacked as being unconstitutional. The court of last resort decided his case in compliance with those rules of appeal and error which they apply in all cases. The following procedure was followed in compliance with the requirements of the statutes of Alabama.

(a) An indictment was returned by a grand jury.—Sections 4524, 4526, 4529, 4556(76), 5202, 8616, 8617, 8630, 8632, and 8665 of the Code of Alabama, 1923.

(b) Petitioner was notified of the offense with which he was charged.—Sections 5568 and 8644 of the Code of Alabama, 1923.

(c) The date of trial was set by the trial judge. —Sections 5565, 8649 and 8650, Code of Alabama, 1923.

(d) Counsel were appointed to represent the petitioner.—Section 5567, Code of Alabama, 1923.

(e) Qualifications of jurors.—Section 14 of an Act approved February 18, 1931, Acts, 1931, p. 56; Section 8603, Code of Alabama, 1923.

B

PETITIONER WAS NOT DENIED THE RIGHT OF COUNSEL WITH THE ACCUSTOMED INCIDENTS OF CONSULTATION AND OPPORTUNITY OF PREPARATION FOR TRIAL.

(1)

Powell Case Distinguished

Counsel for petitioner in brief filed in support of petition for writ of certiorari argue only the proposition that the defendant was denied due process of law in that he was denied the right of counsel with the accustomed incidents of consultation and opportunity of preparation for trial.

This Court in the case of *Ozie Powell et al. v. State of Alabama*, 287 U. S. 45, has definitely determined that the right to counsel in a criminal case is one of the fundamental principles of liberty and justice which lie at the base of our civil and

political institutions and that the denial to a defendant in a criminal case of the right to be represented by counsel amounts to a denial of due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

We think it important, however, to emphasize at this time the facts which were before this Court in the Powell case, supra. Powell, together with eight other negro boys, was arrested in Jackson County, Alabama, charged with the rape of two white girls while traveling on a freight train between Chattanooga, Tennessee, and Huntsville, Alabama. Powell and his co-defendants were taken off of a train by a sheriff's posse and transferred to the jail at Scottsboro, the county seat of Jackson County. The militia was called out to assist in safeguarding the prisoners and continued to guard them until after the trials had been completed. The proceedings from beginning to end took place in an atmosphere of tense, hostile and excited public sentiment. All of the defendants were youthful, ignorant and illiterate. All of them were residents of other states where their families and friends resided. When Powell and his co-defendants were arraigned, the entire Bar of Jackson County was appointed to defend the several defendants. On the day on which the trials were to begin, when the court inquired whether the parties were ready for trial no counsel answered for the defendants or appeared to represent or defend them. The decision of this Court contains a long colloquy between a lawyer of Chattanooga, Tennessee, the Court and some members of

the Bar of Scottsboro, Alabama, who had been appointed to represent the defendants. This colloquy tends to indicate that it had not been determined definitely as to who was to represent the defendants. Mr. Justice Sutherland, in the Powell opinion, after quoting the colloquy above referred to, said:

> "And, in this casual fashion, the matter of counsel in a capital case was disposed of.
>
> "*It thus will be seen that until the very morning of the trial, no lawyer had been named or definitely designated to represent the defendants.* Prior to that time, the trial judge had 'appointed all the members of the Bar' for the limited 'purpose of arraigning the defendants'. Whether they would represent the defendants thereafter if no counsel appeared in their behalf was a matter of speculation only, or as the judge indicated, a mere anticipation on the part of the court. Such a designation, even if made for all purposes, would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel. How many lawyers were members of the Bar does not appear; but in the very nature of things, whether many or few, they would not, thus collectively named, have been given their clear appreciation of responsibility or impressed with that individual sense of duty which should, and naturally would, accompany the appointment of a selected member of a Bar specifically named and assigned.

"That this action of the trial judge in respect of appointment of counsel was little more than an expansive gesture, imposes no substantial or definite obligation upon anyone, is borne out by the fact that prior to the calling of the case for trial on April 6, a leading member of the local bar accepted employment on the side of the prosecution and actively participated in the trial."

"Nor do we think the situation was helped by what occurred on the morning of the trial. At that time, as appears from the colloquy printed above, Mr. Roddy stated to the court that he did not appear as counsel but that he would like to appear along with counsel that the court might appoint; that he had not been given an opportunity to prepare the case; that he was not familiar with the procedure in Alabama, but merely came down as a friend of the people who were interested; that he thought the boys would be better off if he should step entirely out of the case. Mr. Moody, a member of the local bar, expressed a willingness to help Mr. Roddy in anything he could do under the circumstances. To this the court responded, 'all right, all the lawyers that will; of course, I would not require a lawyer to appear if—.' Mr. Moody continued, 'I am willing to do that for him as a member of the bar; I will go ahead and help do anything I can do.' *With this dubious understanding the trials immediately proceeded, the defendants, young, ignorant, il-*

literate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime, regarded with especial horror in the community where they were tried, were thus put in peril of their lives within a few minutes after counsel for the first time charged with any degree of responsibility, began to represent them." (Emphasis supplied)

Basing his conclusions entirely on the facts presented, Mr. Justice Sutherland proceeds to announce, for the first time, the rule that the Fourteenth Amendment to the Constitution of the United States guarantees to a defendant charged with a capital offense in a state court the right to counsel. The following quoted part of the opinion of the Powell case contains the real holding therein, and clearly demonstrates how very carefully Mr. Justice Sutherland predicated his conclusion on the facts presented in the particular case at bar (287 U. S. 71, 72):

"*In the light of the facts outlined in the forepart of this opinion* — the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and oppor-

tunity to secure counsel was a clear denial of due process.

"But passing that, and assuming their inability even if opportunity had been given, to employ counsel as the trial court evidently did assume, we are of opinion that, *under the circumstances just stated*, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. *Whether this would be so in other criminal prosecutions or under other circumstances we need not determine.* All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' *In a case such as this, whatever may be the rule*

in other cases, the right to have counsel appointed is a logical corollary from the constitutional right to be heard by counsel." (Emphasis supplied)

This Court has itself officially recognized Justice Sutherland's expressed intent to limit the scope of his opinion to the facts therein presented. In *Palko v. Connecticut*, 302 U. S. 319, 327, Mr. Justice Cardozo speaks for the Court regarding the Powell decision:

> "The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a Federal court. *The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.*" (Emphasis supplied)

The Court's attention is also respectfully called to the following cases in which the several courts concerned discuss the distinguishing features of the Powell case under somewhat similar circumstances as those here presented: *Prescott v. State*, 37 P. (2d) 830, 833, 56 Okla. Crim. 259; *Wilson v. Lanagan*, 19 F. Supp. 870, 873; *Shores v. United States*, 80 Fed. (2d) 942, 945.

It seems evident under the rule of the Powell case that where a trial court has appointed counsel

to represent a man charged with a capital offense either in accordance with the statutes of a given state or in accordance with the mandate of the decision in the Powell case, that the question as to whether or not the particular appointment is within or beyond the objections therein delineated depends upon the facts and circumstances of each individual case.

This being true, it is submitted that the present case may readily be distinguished from the Powell case in that the facts here involved are substantially different in detail from those upon which the Court bases its conclusion set forth in the opinion in that case.

Here counsel were definitely appointed by the court (R. 1) and not appointed in a casual fashion as in the Powell case.

Here the defendant is not a mere youth but was thirty-two years of age at the time of his trial (R. 9).

Here no hostile sentiment prevailed at the trial. As a matter of fact, the nature of the case clearly precludes any such inference.

Here no racial question was involved. The killing was by a negro man of his wife, a negro woman.

Here the crime had occurred more than four years from the date of the trial. This also tends to

reveal the utter lack of public interest which must have existed at the time of the trial.

Here the defendant was not haled back and forth under guard of soldiers nor is there any indication that any military forces were present during the trial of the case.

Here the defendant was not charged with an atrocious crime calculated to arouse the community at large. The murder had long since been committed at the time of this trial.

Here the defendant was a resident of the county in which he was tried. It is not shown that he had no friends or family in the county but, on the contrary, it appears that his brothers were present in the community (R. 33).

Here the defendant was not imprisoned immediately following the commission of the crime but was at large for more than three years during which time it must be presumed that he had full opportunity to contemplate his crime and to secure witnesses if any had existed.

It is stated in the motion for continuance and motion for new trial that the defendant is of low mentality but this appears rather from statements made by counsel,—obviously in an attempt to bring this case within the facts of the Powell case —than from any evidence adduced on the trial of the case or on the hearings of the several motions presented.

It appears therefore that the only question here presented for decision, is whether the time between appointment of counsel in the present case and the date set for trial was of such short duration as to prevent counsel from adequately preparing a defense. A determination of this question can only be had after the consideration of all the facts and circumstances surrounding the appointment of counsel and the setting of the date for trial for we do not believe that this Court will announce as a hard and fast rule that two, three or five days must intervene between the appointment of counsel and the date of trial.

(2)

The Trial Court did not abuse its discretion in failing to continue the case.

This Court has on numerous occasions determined that the granting or denial of a continuance are matters within the discretion of the Trial Court and are reviewable only in those instances where a gross abuse of discretion appears from the record.

In *Franklin v. State of S. C.*, 218 U. S. 161, 168, the defendant, a citizen of the negro race, was convicted in South Carolina of the crime of the murder of a white man and was sentenced to suffer the death penalty. The appeal was from a decision of the Supreme Court of South Carolina affirming the judgment of the Court of General Sessions of that State. One of the points raised on the appeal to this court was the denial of a continuance asked

for because, as alleged, counsel for accused had not had sufficient time or opportunity to prepare for his client's defense. In discussing the merits of this contention and in sustaining the ruling of the Supreme Court of South Carolina, holding that there had been no denial of due process by such refusal, the Court speaking through Mr. Justice Day, states:

> "It is next contended that the plaintiff in error was denied due process of law in the refusal of the court to continue his case when the same was called for trial. *It is elementary that the matter of continuance rests in the sound discretion of the trial Court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial court in such a case a denial of due process of law.*" (Emphasis supplied)

In *Isaacs v. United States*, 159 U. S. 487, 489, where Isaacs, a Cherokee Indian, who was convicted of the murder of a white man in Indian country, appealed to this Court and assigned as error the action of the Court in overruling his motion for continuance, requested because of the absence of a material witness for the defense, the court stated:

> "That the action of the Trial Court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused is settled by too many authorities to be now open to ques-

tion. Woods v. Young, 4 Cranch, 237; Barrow v. Hill, 13 How. 54; Crumpton v. United States, 138 U. S. 361; Cox v. Hart, 145 U. S. 376; Earnshaw v. United States, 146 U. S. 60, 68; Means v. Bank of Randall, 146 U. S. 620. It appears that forty-nine days before the case was called for trial, an application was made and granted to have the witness whose testimony was desired, summoned at the expense of the government, the affidavit showing that she was within the jurisdiction of the court. It was not shown that any diligence was used to procure the attendance of the witness; or that any attachment was asked for, although the trial continued for several days, or why the subpoena was not served. The affidavit did not show that the defendant could not make the same proof by other witnesses, or that he could not safely go to trial without the testimony of the witness in question. In fact, all that the affidavit showed that the witness could prove was established by other testimony, including that of the defendant himself. There was clearly no abuse of discretion."

The foregoing conclusions were concurred in by this court in *Goldsby v. United States*, 160 U. S. 70, 72. See also *Gilmore v. United States*, 268 F. 719, 721. It does not appear that this view has ever been departed from or that these cases have been overruled.

The question then presents itself whether there has been such a gross abuse of discretion in the pres-

ent case as to justify this Court in overturning the action of the Trial Court and declaring that such action was a denial of due process of law to the defendant? In considering whether there was such an abuse by the Trial Court, we submit that this Court should consider the fact that the Trial Court was present at the time of the hearing on the motion for continuance (if such a hearing was had) and the amended motion for new trial.

The Court was familiar with all of the attendant circumstances. The Court saw the defendant and talked with him on arraignment and was as able to judge of his mentality and his ability to aid counsel, as counsel themselves. The Court knew of the cases pending on his docket and whether the defense attorneys were actually and indispensably needed in court for the trial of cases from the day of their appointment to the day the Avery case was called for trial. The Court knew the weather conditions during the period from March 21 to March 24, and was in the position to judge whether the defense attorneys were hampered in their investigation of the merits of the case because of the inclemency of the weather. The Court knew the imminence of the adjournment of the court, the length of time which would elapse before the next meeting of the court, the reluctance of the defendant to submit to trial and all the one thousand and one other matters that occur to an experienced trial judge when a motion for continuance is presented to him for his ruling.

There can be no doubt that it was the realization of the fact that the Trial Court was in such a favorable position with reference to the question that led this Court to the adoption of its position that only in cases of gross abuse of discretion would a denial of continuance be reviewed.

Let us recall for a moment, the facts which were presented to the Trial Court on the motion for continuance and the amended motion for new trial, and let us at the same time examine those matters which counsel failed or was unable to present.

By affidavit and oral testimony, the Court was told by Mr. Foshee that he was appointed at two o'clock on March 21, 1938, and that at the time he was appointed to defend Lonnie Avery he was going into the trial of another case and was engaged in this case until about nine P. M. on March 21st; that he had other cases on the docket which required his presence in the court room on the 22nd of March and was also detained in court on the 23rd day of March, waiting for Lonnie Avery's case to be called (R. 56); that he could get no information from the defendant, although he conferred with him on Monday or Tuesday, for the reason that the defendant was illiterate and had not the mind of even an eight year old child; and finally, that he was unable to visit the scene of the crime for the reason that it was raining.

The Trial Judge, it is submitted, having been in attendance upon court during the period from

March 21st to March 24th, the day on which the motion for continuance was submitted, certainly was in a position to know, especially when it is remembered that the scene of the trial was a small town with few lawyers—not comparable to a large metropolitan court where lawyers are in and out at all times and some of them may not be known personally to the judge,—of the necessity for counsel being in attendance upon court or of his inability to visit the scene of the crime because of the inclemency of the weather. It must be presumed that the court determined that defense counsel had ample opportunity to investigate the merits of the case. No showing is made that counsel, Mr. Foshee, was engaged in the trial of cases during the nights of March 22nd nor March 23, 1938, and we know of no immutable rule of law prohibiting counsel employed in the defense of a client charged with murder from working at night on such case.

The same may be said of the affidavit and testimony of counsel, Fred G. Wood, the other attorney appointed for defendant. According to his own affidavit, his last case "was disposed of about 4:30 o'clock on the afternoon of March 22, 1938." (R. 7). Even assuming for the sake of argument that appointed counsel Foshee was so occupied in the trial of cases as to be prevented from making an investigation of the Avery case, counsel Wood, according to his own affidavit, had at least forty-eight hours to investigate the case. It has been held in a number of cases that there was no abuse of discretion by the Trial Court in denying a motion for con-

tinuance because of the engagement of counsel in another court, even though the absent counsel was the leading attorney in the case, where, it is shown that other counsel was associated with him in the case and was competent to handle it. Brock v. So. & No. R. Co., 65 Ala. 79; Birmingham v. Goolsby, 227 Ala. 421, 150 So. 322. See many other cases collated in the extensive annotation in 112 A. L. R. 594, 600.

Defense counsel in their affidavits and testimony indicate that witnesses which they might have been able to secure would have testified regarding the truth and veracity of witnesses for the State and of the defendant's character (R. 34), although none were found—even during the long period between the end of the trial and the date of the hearing on the motion for new trial. In *People v. Trimble*, 177 N. E. 696, 345 Ill. 82, 86, the Supreme Court of Illinois refused to reverse the trial court's ruling denying application for continuance solely on the ground of want of preparation of counsel and particularly the lack of opportunity to secure the attendance of character witnesses. The Court there states:

> "The only purpose for which a continuance under his affidavit was shown could have been justified was to secure the attendance of character witnesses. The trial began four days after the arraignment, but both plaintiff in error and his counsel had full reason to believe for some months that the indictment would be

returned. * * * So far as the record shows it would seem that in the four days intervening between arraignment and trial, plaintiffs in error's counsel could have procured the attendance of character witnesses from St. Louis. There was no showing of any attempt to do so. The denial of the continuance on the ground of want of preparation of counsel was not such an abuse of discretion under all the facts in this case as to require a retrial."

Again in *Butler v. State*, 288 S. W. 218, 105 Tex. Cr. App. 228 the Court held that there was no abuse of discretion shown in denying continuance for character witnesses. The Court there stated:

"The rule is that if the trial court in the exercise of his sound discretion, refuses a continuance sought only to secure proof of the good character of the defendant, such ruling will not ordinarily cause a reversal. Duncan v. State, 30 Tex. App. 1, 16 S. W. 753; Yarbrough v. State, 66 Tex. Cr. Rp. 324, 147 S. W. 270. We think there was no abuse of the court's discretion shown in this matter."

There is also an indication that had defendant had the opportunity he could have procured witnesses to testify as to his mental capacity but that because he was denied an opportunity to prepare for trial, his counsel were unable to interview witnesses regarding his sanity (R. 34, 35). It was admitted by defense counsel that there were four

practicing physicians in Centerville, all active in their practice and that they, in all probability, would answer a call at night. Under the Alabama law, as stated in *Rhodes v. State*, 168 So. 869, 232 Ala. 509, a regular practicing physician has been held qualified to express an opinion on the question of sanity. The court in the Rhodes case, stated:

> "From our early judicial history a regular practicing physician has been held qualified to express an opinion on the question of sanity to be accorded greater weight than that of a non-expert witness. McCurry v. Hooper, 12 Ala. 823, 46 Am. Dec. 280; 22 C. J. page 668, Section 759.
>
> "Medical jurisprudence is now one of the subjects on which examination is had before issuing license to practice medicine. Code, Section 2837 (1627)."

We submit that counsel were aware of the Rhodes opinion, and that the Trial Court, also knowing of the Rhodes opinion, treated the contention that a continuance should have been granted in order to permit inquiry into sanity vel non of the defendant with that case in mind. Here again attention may be directed to the fact that, although three months or more expired between the conclusion of the trial and the hearing on the amended motion for new trial, no witnesses were brought forward at the latter date to testify that the defendant was insane or even that he was of low mentality. It has been frequently held by

the Supreme Court of Alabama as well as by courts of last resort of other states that the refusal of a continuance on the ground that insufficient time is available to ascertain facts as to the insanity of the defendant or of his family rests within the discretion of the Trial Court and will not be reviewed in the absence of gross abuse of discretion.

Jarvis v. State, 126 So. 127, 220 Ala. 501;

Peterson v. State, 166 So. 20, 231 Ala. 625;

State v. Chandler, 119 S. E. 774, 126 S. C. 149

State v. Miller, 32 P. (2d) 535, 177 Wash. 442.

In the last cited case, *State v. Miller*, one of the reasons advanced by the Supreme Court of Washington for sustaining the Trial Court in refusing to grant defendant's motion for new trial based on the refusal of a motion to continue was that:

> "No showing is made that, even though he had had more time within which to prepare his case, he could have procured other or abler expert witnesses to testify for him."

THERE WAS AMPLE OPPORTUNITY FROM THE DATE ON WHICH THE TRIAL WAS CONCLUDED UNTIL THE DATE ON WHICH THE AMENDED MOTION FOR NEW TRIAL WAS PRESENTED TO THE TRIAL COURT, FOR DEFENDANT TO HAVE DIS-

COVERED AND PRESENTED TO THE TRIAL JUDGE ANY EVIDENCE IN HIS FAVOR OF WHICH HE WAS DEPRIVED BY THE UNFAMILIARITY OF HIS APPOINTED COUNSEL WITH THE CASE AND FAILING IN PRESENTATION OF SUCH EVIDENCE, PETITIONER SHOULD NOT NOW BE HEARD TO COMPLAIN THAT DUE PROCESS WAS DENIED.

There is yet another reason why this Court should not conclude that there was such a gross abuse of discretion by the Trial Court as to constitute a denial of due process of law in the instant case.

As we have hereinabove noted, although the trial of the Avery case was concluded on March 24, 1938, the amended motion for new trial was not presented to the Trial Court nor ruled upon until June 30, 1938, more than three months after the trial of the case, Isn't it reasonable to assume that if there had been testimony available to the defendant to cast any doubt upon his guilt, or if the defendant was insane, or even if he were of such low mentality as to raise a reasonable doubt of his capacity to commit the crime, or if there were character witnesses or any other witnesses to the crime, defendant's counsel would have been able to produce them during the more than three months period which so elapsed? No newly discovered evidence was presented to the Trial Court at the time of the hearing on the amended motion for new trial. The statement by Mr. Justice Gardner of the Supreme

Court of Alabama in his able opinion, concurred in by all the Justices, that "the record discloses that the difficulty under which counsel labored related to the lack of material on which to base a defense, rather than any mere matter of time" in our judgment adequately sums up this point. Not one mitigating circumstance was brought to light although for aught that appears of record counsel had ample time for investigation.

In *Smith v. State*, 21 S. W. (2d) 400, 403, 159 Tenn. 674, the court found that the verdict had been returned on October 4, 1928, and that the motion for new trial was not submitted until October 27th, more than three weeks elapsing. The Supreme Court of Tennessee, in considering the propriety of the Trial Court's ruling denying defendant's motion for continuance stated:

> "This was ample time for the plaintiff in error to have discovered and presented to the Trial Judge any evidence in his favor of which he was deprived by the unfamiliarity of his appointed counsel with the case. The fact that no such evidence was presented to the Trial Judge is convincing that nothing was overlooked. We think, therefore, that it appears affirmatively from the record that no prejudice resulted to the plaintiff in error from the fact that he was represented by counsel appointed on the day the trial was begun. * * *"

Nor does this Tennessee case stand alone in its reasoning.

The Supreme Court of Nebraska has had before it a similar question and treated it as follows in *Smith v. State*, 241 N. W. 750, 123 Neb. 17:

> "A motion for a new trial was filed in the case, which was overruled on October 5, 1931, more than three months after the trial. *The defendant makes no showing at that time of newly discovered evidence, and we fail to see wherein the defendant was prejudiced by a denial of a continuance. It would seem that due diligence would require that he should secure any evidence that might be available to him within the period which elapsed after the trial.* Where there is no showing of newly discovered evidence which he was not able to obtain at the time of the trial, we are unable to say that he was prejudiced by reason of the denial of the continuance. *It would be a futile gesture, inconsistent with the present trend of judicial opinion, to reverse a judgment and remand a case because a continuance for preparation was denied by the trial court, where, so far as the record shows, it would be tried again on the same evidence.* Taking into account all the facts and circumstances presented by the record, the denial of the defendant's motion for a continuance was not an abuse of discretion." (Emphasis supplied)

The same may be said of the case now before this Court. Although counsel had more than three months in which to present additional evidence to the Court, no evidence seems to have been found and we submit that it is an understatement to say that it would be a futile gesture to reverse this case and send it back to the Circuit Court of Bibb County to be again tried on the same evidence when from all appearances such will be the result of a reversal.

There are numerous other cases decided by the courts of last resort throughout the country holding that before the refusal of a Trial Court to grant the accused a continuance will amount to reversible error its ruling must be a palpable error without the correction of which manifest injustice will be done. All of these cases seem to turn on whether or not the defendant has, in fact, been injured in his substantial rights by the action of the Trial Court in refusing to grant the continuance. For the convenience of the Court, we here point out what we believe to be a fairly comprehensive index of the trend of American decisions on this question.

The Supreme Court of Florida in the case of *Jarvis v. State*, 156 So. 310, 115 Fla. 320, in holding that the ruling of the Trial Court on motion for a continuance did not constitute a clear abuse of discretion and, therefore, that the case would not be reversed because of the refusal to grant such continuance, stated:

"Counsel's mere statement in their motion that they did not have time to prepare the defense is not sufficient. No facts are given on which to base such a statement. Nothing is said as to the character of defense and the complex nature of it that will require more time nor is anything said about witnesses and what was expected to be established by them nor that the accused himself depended upon any named witnesses not within the jurisdiction of the court by whom he expected to prove the character of the act by which the life of the woman was taken."

In *Birmingham v. State*, 96 S. W. (2d) 773, 192 Ark. 1095, the appeal was predicated upon the failure of the Trial Court to grant a continuance because the appellant, being tried for the crime of larceny, was placed on trial two days after being arrested, during which time he was confined in jail without opportunity to discuss his case with his attorneys, and that the attorneys when the case was called had had no opportunity to talk with the witnesses. The court stated:

"The record is silent as to the disposition of this motion (motion for continuance) but it is stated in the appellant's brief that the motion was overruled. Whether or not exceptions were saved to the alleged action of the court we are not advised.

"This court has always been reluctant to interfere with the discretion of the trial court in matters relating to continuances. A presiding judge, from personal observation, is familiar with the attendant circumstances, and has the best opportunity to form a correct opinion upon the case presented, and is presumed to have in mind his duty to properly protect the interests of the accused as well as the rights of society. In reviewing his action, there is much to be considered—the imminence of an adjournment of the court, the length of time which will elapse before the court will sit again, the number of witnesses in attendance, the reluctance of defendants to submit to trial, and the shifts often employed to escape or delay justice. Therefore, to be reversible error, the refusal to grant continuance must be a palpable error without the correction of which manifest injustice will be done. As is said in Loftin v. State, 41 Ark. 153: 'It must be a flagrant instance of the arbitrary or capricious exercise of power by the circuit court, operating to the denial of justice, that will induce us to interfere.'"

In *Allen v. State*, 262 N. W. 675, 129 Neb. 722, the Supreme Court of Nebraska treats the question of the necessity for the granting of a continuance in a criminal case as follows:

"As stated herein, there was no showing of prejudice either at the time the motion for

continuance was presented and denied or on the motion for new trial. It would be futile and unwarranted to reverse the judgment here if on another trial the evidence would be the same. The necessity for a continuance in a criminal case must be determined from the facts and circumstances presented, and a denial is not reversible error unless it appears from the record that the defendant was prejudiced thereby."

In another case which reached the Supreme Court of Nebraska, wherein one Smith was charged with the offense of statutory rape, it was insisted that the case should be reversed because of the refusal of the Trial Court to grant a continuance. The court concluded (*Smith v. State*, 257 N. W. 59, 127 Neb. 776):

"There is no showing in the motion for new trial that there is any evidence which the defendant was not able to procure. The record does not disclose that the rights of the defendant were prejudiced by a denial of the continuance. It is within the sound discretion of the Trial Court to determine under all circumstances of a particular case whether a continuance is required in the interest of justice. The ruling of the Trial Court thereon is not reversible error *unless an abuse of discretion is shown which is prejudicial to the defendant.*" (Emphasis supplied)

In *James v. State*, 196 P. 1045, 27 Wyo. 378, the Supreme Court of Wyoming dealt with the contention that the Trial Court should have granted a continuance upon the ground that the defendant's counsel had not had time to investigate and prepare the case for trial. The court stated:

> "It must be admitted that considering the seriousness of the charge, the time for preparation was short, but whether too short the trial court was much better able to judge than are we, and we cannot hold that it was in error in denying the motion, unless it appear that such action constituted an abuse of discretion. Robinson v. State, 18 Wyo. 216, 106 Pac. 24. From the later events of the prosecution, it appears that all persons having any knowledge of facts material to the case were present as witnesses at the trial, *and no suggestion is made of any additional evidence that could have been procured, or any reason why a better defense could have been made if the case had been continued.* See State v. Chitman, 117 La. 950, 42 So. 437. We would not be inclined on this ground alone to disturb the judgment in this case."

In *Fuson v. Commonwealth*, 251 S. W. 995, 996, 199 Ky. 804, the court states in part:

> "It is not shown that they (the defendants) were prejudiced by haste, *or would have been benefited by an extension of time*, and we are, therefore, unable to say that their substantial

rights have been prejudiced in this way." (Emphasis supplied)

In two other Kentucky cases, *Mitra v. Commonwealth*, 5 S. W. (2d) 275, 224 Ky. 13, and *Smith v. Commonwealth*, 128 S. W. (2d) 590, 278 Ky. 385, the Court of Appeals of Kentucky reiterates the rules hereinabove stated. In *Mitra v. Commonwealth*, the Court states:

> "Appellant admitted that he killed George, and he gave a detailed statement of the facts surrounding the killing. Learned counsel was in a position to place himself in possession of all of these facts in much less time than the court gave him. What preparation he expected to make in the way of defense, we do not know, but an attorney should play the cards that are dealt him and that is all that the law requires of him. His client was the dealer, and the attorney is not responsible for the cards that he holds."

In the *Smith v. Commonwealth* case, the Court refused to hold that the Trial Court was in error in denying defendant's motion for continuance for the reason that "the names of no witnesses were given nor was there any showing what any would state nor other showing as to necessity of continuance."

In *People v. Gray*, 249 N. W. 501, 264 Mich. 155, the Supreme Court of Michigan refused to

reverse a conviction for assault with dangerous weapon with intent to rob because of the denial of the motion for extension of time to prepare for trial where no prejudice was shown, the Court stating:

> "It does not appear defendant would have been in any better position for trial ten or sixty days from June 24. No prejudice is shown to have resulted from a speedy and public trial."

A similar conclusion was reached by the Supreme Court of Illinois in the case of *People v. Dale*, 189 N. E. 269, 270, 355 Ill. 330, the Court stating:

> "Time to prepare for trial does not include time to concoct a non existent defense but only such time as may be necessary and reasonable for the preparation and presentation of whatever defense the defendant has."

In *People v. Norman*, 2 N. E. (2d) 891, 893, 364 Ill. 28, Mr. Justice Orr speaking for the court stated:

> "Before a judgment of conviction will be reversed because of denial of motion for a continuance based upon lack of time to prepare for trial, it must appear that the refusal of additional time in some manner embarrassed the accused in preparing his defense and so prejudiced his rights. People v. Kunowiski, 360 Ill. 416, 196 N. E. 524. It is only where the record shows that the Trial Court has abused

its discretion that a reviewing court will interfere."

The Supreme Court of Texas has also touched on the question. In *McKenzie v. State*, 11 S. W. (2d) 172, 177, 116 Tex. Cr. 395, the Court states:

> "The reasons asserted in the application (for continuance) relative to the lack of preparation of applicant's attorneys, and their inability to secure material testimony for his defense do not make it apparent that, in the time allowed, applicant's attorneys were unable to properly prepare for trial * * *. Applicant fails to suggest in his motion the nature of the defense which he expected to interpose. There were few eye witnesses to the transaction which resulted in the homicide and it is manifest from an examination that it would have consumed but little time to have talked to the witnesses and learned the facts within their knowledge concerning the homicide. Considering the application in the light of the evidence * * * we find no abuse of discretion on the part of the trial court in overruling the motion."

The Supreme Court of Ohio has treated the question at length in *Stoyle v. State*, 165 N. E. 596, 32 Ohio App. 133, concluding:

> "The rule in this state seems to be settled as to the question of the continuance of a case where it is claimed a failure to do so is preju-

dicial to the rights of the applicant. We need but quote the case of Holt v. State, 11 Ohio St. 691: 'An application for the continuance of a case, is addressed to the sound discretion of the court, and its action cannot be reversed on error, unless it clearly appears, from all the facts and circumstances, that there has been an abuse of the discretion, *operating to the prejudice of the party, in the final determination of the case;* when it may be a proper ground to order a new trial. When the evidence in the case is not set out, so as to enable the appellate court to say that there has been such abuse of discretion, and prejudice to the party, it will not interfere." (Emphasis supplied)

And the Supreme Court of Washington in a prosecution for murder in *State v. Mahoney*, 208 P. 37, 120 Wash. 633, in sustaining the action of the Trial Court in refusing an application for continuance to enable defendant's counsel to qualify themselves to properly defend the defendant, reached a similar conclusion, based upon the fact that the defense was ably conducted and no showing was made that the defendant failed to secure all testimony in his favor which was procurable.

See also *Weems v. State*, 182 P. 264, 16 Okla. Cr. 198; *State v. Geo. Whitfield*, 175 S. E. 93, 206 N. C. 696; *Sims v. Commonwealth*, 115 S. E. 382, 386, 134 Va. 736; and *Commonwealth v. Tolarico*, 177 Atl. 1, 317 P. St. 481, 484.

(3)

Snyder v. Massachusetts

We feel that no discussion of due process of law and its application to a criminal case would be complete without including the recently decided case of *Snyder v. Massachusetts*, 291 U. S. 97. It is earnestly submitted that the opinion in that case imposes an impregnable barrier between the facts in the Powell case and those here at hand. It is submitted that when the language of the Snyder case is applied to the facts in the instant proceeding there can remain no further doubt regarding whether due process of law was granted to the defendant in this case, but that this Court must conclude that the defendant was deprived of no essential right by the Court below.

The question was presented to this Court in the Snyder case as to whether a view by the jury of a scene of a crime, in the absence of a defendant who had made demand that he be present, was a denial of due process under the Fourteenth Amendment. In that case the defendant was convicted of having shot to death one James M. Kiley at a gasoline station in Massachusetts. At the opening of the trial there was a motion by the Commonwealth that the jury be directed to view the scene of the crime. This motion was granted but the request of counsel for Snyder that he, Snyder, be permitted to view the scene with the jury was denied. Mr. Justice Cardozo, in speaking for the Court, stated:

"So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process *to the extent that a fair and just hearing would be thwarted by his absence and to that extent only.*" (Emphasis supplied)

The Court then proceeds to a discussion of the point involved, making the following very pertinent observations:

"What we are subjecting to revision is not the action of the Legislature excluding a defendant from a view at all times or in all conditions. What is here for revision is the action of the judicial department of a state excluding the defendant in a particular set of circumstances, and the justice or injustice of that exclusion must be determined in the light of the whole record."

Applying the foregoing statement to the instant case, it may well be paraphrased as follows:

"The question presented to this Court is not the action of a Legislature denying the right of defendant to counsel or of denying to counsel time for preparation at all times and in all conditions. What is here for revision is the action of the Judicial Department of a State (the Circuit Court of Bibb County, Alabama) denying the defendant a continuance under a particular set of circumstances, and the justice or injustice

of that denial must be determined in the light of the whole record."

Counsel for petitioner insists that his complaint is not, solely, "of the commission of mere error but of a wrong so fundamental that it made the whole proceedings a mere pretense of a trial and rendered the conviction and sentence wholly void." (Petitioner's brief, p. 17.).

Again referring to the case of *Snyder v. Massachusetts*, supra, we note the following language:

"True indeed it is that constitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry whether prejudice to a defendant has been wrought through their denial * * *. But here, in case at hand, the privilege, if it exists, is not explicitly conferred, nor has the defendant been denied an opportunity to answer and defend. The Fourteenth Amendment has not said in so many words that he must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court, and not because they are there already, in advance of the decision. *Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results.*" (Emphasis supplied)

Again applying the Court's words to the case at hand and paraphrasing them:

> "In this case, the privilege, if it exists, of the right of counsel to a specific period of time in which to prepare the defense has not been explicitly conferred. The Fourteenth Amendment has not said in so many words that counsel must have an hour, a day, three days, a week, two weeks, a month, or a year in which to prepare for trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court and not because they are there already in advance of the decision. Due process of law requires that the proceedings shall be fair, but fairness is a relative not an absolute concept. It is fairness with reference to particular conditions or particular results."

It is submitted, therefore, that basing its determination on the rules that "the fairness required under due process of law is a relative and not an absolute concept", and that "the fairness required under due process of law must be measured by the particular conditions or particular results," the Court cannot in the case now presented to it hold that the Powell case is here applicable or that the petitioner was denied due process of law. To so hold would be to send this case back to the Circuit Court of Bibb County, Alabama, with instructions that it be retried upon the same evidence upon which it was originally tried, for from aught that appears from the record there is no other available evidence.

Here it will be pertinent to recall the words of Mr. Justice Cardozo in the case of *Snyder v. Massachusetts*, supra.

> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence."

It is earnestly submitted, therefore, that this Court be not blinded by the "tyranny of labels" but that it be guided by the shining light given by the facts, which point to the inescapable conclusion that the Trial Court did not abuse its discretion in refusing to grant the continuance and that the defendant was not, by any action of that Court, denied due process of law.

(4)

Cases Cited By Petitioner

The only cases cited by counsel for petitioner in his brief, other than the Powell case, which has heretofore been discussed at length, in support of his contention that his client was denied due process of law, are those of *Brown v. Mississippi*, 297 U. S. 278, and *Johnson v. Zerbst*, 304 U. S. 458, and

other cases collated in 84 A. L. R. 544. It may be said both of the cases particularly named and those contained in the annotation to A. L. R. that in each of them only a very short time intervened between the appointment of counsel and the trial of the case and in almost all of them there are certain other mitigating circumstances demonstrating the impropriety of placing the defendant on trial on such short notice, which circumstances do not exist in the present case.

A reading of the case of *Brown v. Mississippi*, 297 U. S. 278, 80 L. Ed. 682, illustrates the inapplicability of the citation. True it is that in the course of the opinion the court makes the statements set forth on pages 15 and 16 of counsel's brief but these statements, we submit, must be applied to the particular facts which were presented to the court in that case, i. e., the admissibility of a confession of of guilt by the accused extorted by brutality and violence. Obviously, this denial of due process should not be permitted a place in the argument of this case when the facts are so widely divergent.

Johnson v. Zerbst, 304 U. S. 458, is authority merely for the conclusion that in a Federal Court, under the Sixth Amendment to the Constitution of the United States, one charged with a felonious crime is entitled to the assistance of counsel and that compliance with the Sixth Amendment is an essential jurisdictional prerequisite to a Federal Court's authority. It is further authority for the proposition that while the right to counsel may be

waived such waiver must be intelligently and competently entered and not as the result of ignorance of legal rights.

In *Commonwealth v. O'Keefe*, 298 Pa. 169, 173, 148 Atl. 73, the defendant was forced to trial on the day of arrest notwithstanding counsel's statement regarding the impossibility of being prepared for trial.

In *Schaffer v. Territory*, 127 P. 746, 14 Ariz. 329, counsel were employed on the 15th day of December and the case was set for trial on December 19. The court held that under the facts, first, that the defendant was entitled to a subpoena to produce witnesses, second, that subpoenas had issued for three such witnesses at the defendant's request and, third, that the return had not been made by the sheriff for the reason that he had not had time to serve the subpoenas and make the return, a denial of continuance was prejudicial to the rights of the defendant.

The cases of *State ex rel Turner v. Davis*, 9 Okla. Cr. R. 94; *People ex rel Burgess v. Risley*, 66 How. Pr. 67, and *Batchelor v. State*, 125 N. E. 773, 189 Ind. 69, 76, merely recite the rule that the defendant is entitled to reasonable opportunity to prepare for trial, in support of the conclusion reached that a person confined in jail should be given an opportunity to consult freely with counsel without disturbance.

In *State v. Collins*, 29 So. 180, 104 La. 629, and *Mitchell v. Commonwealth*, 7 S. W. (2d) 823, 225 Ky. 83, the decisions reached that the defendant was prejudiced, because of the denial by the court of his motion, were based on circumstances similar to those in the Powell case, to wit, mob scenes, general violence and other mitigating circumstances preventing a fair trial of the defendant at the time the case was heard.

The case of *State v. Poole*, 23 So. 503, 50 La. Ann. 449, is readily distinguishable. The court there says:

> "Had the accused been at liberty, under bond, so that he could have conferred freely with counsel who were appointed, and gone to the scene of action, and ascertained what evidence there was attainable in his favor, we would feel less like holding that the trial was unduly precipitate; *but in view of the fact that he was incarcerated in jail from the date of the homicide, and unable to see and confer with friends, or counsel whom the court had assigned for his defense*, it does seem to us that the hardship put upon him was unusually great, particularly in view of the fact that the indictment charged him with murder; that the jury found him guilty, without qualification; and that the trial judge sentenced him to death." (Emphasis supplied)

In this case Avery was at large for more than four years from the date of commission of the crime and had witnesses been available to support his

theory, it is certain that he could have procured them in that time, or at least have made a mental note of their identities so that he could advise counsel of them when and if he was brought to trial.

In *Reliford v. State*, 79 S. E. 1128, 140 Ga. 777, 778, counsel appointed by the court to represent the defendant on trial for his life were allowed ten minutes to confer before entering upon trial and, after conference, when they asked for continuance on the ground of lack of time to prepare the defense, their request was denied.

Further demonstrative of the inapplicability to the present case of those cases noted in the Powell decision and those noted in the A. L. R. Annotation cited by counsel are the cases of *McArver v. State*, 40 S. E. 779, 114 Ga. 514; *Sanchez v. State*, 157 N. E. 1, 199 Ind. 235, 246; *Jackson v. Commonwealth*, 287 S. W. 17, 215 Ky. 800. In the first case, the McArver case, defendant's counsel retired from the case on the day of the trial and defendant was put to trial on that same day, with appointed counsel acting for him. In the Sanchez case, an ignorant Indian was put to trial with an incompetent attorney. The court in holding him entitled to a new trial, cited facts readily illustrative of the error of the conviction. In the Jackson case, a negro was put to trial on Saturday with counsel appointed the same day.

The other cases cited by counsel for petitioner are equally inapplicable as even a casual reading will immediately reveal.

CONCLUSION

We conclude then that the laws of the State of Alabama afforded this petitioner due process of law, that the rules of procedure and practice applied to his case were the same as were applied to all persons charged with crimes of the same nature in the State of Alabama and the same are not unreasonable. Therefore, petitioner was not denied equal protection of the laws nor was he denied due process of law.

It is, therefore, respectfully submitted that this case should be affirmed.

Respectfully submitted,

THOMAS S. LAWSON,
ATTORNEY GENERAL OF ALABAMA,
COUNSEL FOR RESPONDENT.

WILLIAM H. LOEB,
ASSISTANT ATTORNEY GENERAL.
ON THE BRIEF.

APPENDIX

ALABAMA CODE OF 1923

4524. INDICTABLE OFFENSES.—All felonies and misdemeanors, originally prosecured in the circuit court, are indictable offenses.

4526. CAPTION AND CONCLUSION.—An indictment must contain, in the caption or body thereof, the name of the state, county, court, and term in and at which it is preferred, and must conclude "against the peace and dignity of the State of Alabama."

4529. STATEMENT OF OFFENSE. — The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment; and in no case are the words "force of arms" or "contrary to the form of the statute" necessary.

4556 (76). MURDER. A. B. unlawfully and with malice aforethought, killed C. D., by shooting him with a gun or pistol, etc. (or by striking him with an iron weight, or by throwing him from the top of a house, or by pushing him into the river, whereby he was drowned, etc., as the case may be.)

5202. OBJECTIONS TO INDICTMENT FOR DEFECT IN GRAND JURY; WHEN NOT AVAILABLE; EXCEPTIONS.—No objection can

be taken to an indictment, by plea in abatement or otherwise, on the ground that any member of the grand jury was not legally qualified, or that the grand jurors were not legally drawn or summoned, or on any other ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the officers designated by law; and neither this objection nor any other can be taken to the formation of a special grand jury summoned by the direction of the court.

5565. CASES SET FOR PARTICULAR DAYS; EXCEPTIONS.—It is the duty of the clerk of the circuit court to set for trial all criminal cases in his court, except capital cases, and cases of parties in custody, for particular days; and no case so set shall be called for trial before such day.

5567. WHEN COUNSEL APPOINTED FOR DEFENDANT IN CAPITAL CASE. — If the defendant is indicted for a capital offense, and is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours.

5568. SERVICE OF COPY OF INDICTMENT AND LIST OF JURORS ON DEFENDANT IN CAPITAL CASE.—If the defendant is indicted for a capital offense, a copy of the indictment and a copy of the venire for his trial, if a special venire is required for his trial, must be served on him, or on counsel appearing for him, at least one entire day before the day set for his trial.

8603. QUALIFICATIONS OF PERSONS PLACED ON JURY ROLL AND IN JURY BOX. —The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English, and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.

8616. DRAWING GRAND AND PETIT JURIES FROM JURY BOX.—At any session of a court requiring jurors for the next session, the judge, or where there are more than one, then any one of the judges of the court shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit juries for the first week of such session of the court, or if a grand jury is not needed for the session at least thirty persons, and as many more persons as may be needed for jury service in courts having more than one division for the first week, and after each name is drawn it shall not be returned to the jury box, and there shall be no selection of names, and must seal up the names thus

drawn and retain possession thereof, without disclosing who are drawn until twenty days before the first day of the session of the court for which the jurors are to serve, when he shall forward these names by mail, or express, or hand the same to the clerk of the court who shall thereupon open the package, make a list of the names drawn, showing the day on which the jurors shall appear and in what court they shall serve, and entering opposite every name the occupation of the person, his place of business, and of residence, and issue a venire containing said names and information to the sheriff who shall forthwith summon the persons named thereon to appear and serve as jurors.

8630. OBJECTIONS TO INDICTMENTS; HOW TAKEN.—No objection to an indictment on any ground going to the formation of the grand jury which found the same can be taken to the indictment, except by plea in abatement to the indictment; and no objection can be taken to an indictment by plea in abatement except upon the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same; and neither this objection, nor any other, can be taken to the formation of a special grand jury summoned by the direction of the court.

8632. SPECIAL AND EXTRA TERMS OR SESSIONS: JURIES FOR.—Juries, grand and petit, for any special, adjourned, or extra term or session of any court requiring grand or petit juries, which have not been drawn by the judge of the court, may be drawn by the judge in term time, or vacation,

or the judge of the court may draw as many persons to serve as grand and petit jurors as he thinks necessary, and have them summoned as in cases where jurors are drawn to try capital cases.

8644. ORDER FOR SPECIAL VENIRE; DRAWING AND SUMMONING SPECIAL VENIRE.—Whenever any person or persons stand indicted for a capital felony, the court must, on the first day of the term, or as soon as practicable thereafter, make an order commanding the sheriff to sommon not less than fifty nor more than one hundred persons, including those drawn on the regular juries for the week set for the trial of the case, and shall then in open court draw from the jury box the number of names required, with the regular jurors drawn for the week, set for the trial, to make the number named in the order, and shall cause an order to be issued to the sheriff to summon all persons therein named to appear in court on the day set for the trial of the defendant, and must cause a list of the names of all the jurors drawn for the week in which the trial is set, and those drawn as provided in this section, together with a copy of the indictment, to be forthwith served on the defendant, by the sheriff, and the defendant shall not be entitled to any other or further notice of the jurors drawn for his trial nor of the charge or indictment upon which he is to be tried.

8650. COURT MAY FIX TRIAL OF CAPITAL CASE FOR ANY SUBSEQUENT DAY OF SESSION.—The court may, on any day of the ses-

sion, fix the time for the trial of any capital case or cases for any subsequent day of the session.

8665. GRAND JURIES; HOW AND WHEN EMPANELED.—There shall be empaneled in every county having less than fifty thousand population, not less than two grand juries in every year, and when they have completed their labors, in its discretion the court may permit them to take a recess subject to the call of the judge of the circuit court, or chief justice of the supreme court, and may be reassembled at any place where the circuit court of the county is to be held. In all counties having over fifty thousand population, there shall be empaneled not less than four grand juries in every year.

pp. 5+6+2

SUPREME COURT OF THE UNITED STATES.

No. 124.—October Term, 1939.

Lonnie Avery, Petitioner,
vs.
The State of Alabama.

On Writ of Certiorari to the Supreme Court of the State of Alabama.

[January 2, 1940.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner was convicted of murder in the Circuit Court of Bibb County, Alabama; he was sentenced to death and the State Supreme Court affirmed.[1] The sole question presented is whether in violation of the Fourteenth Amendment "petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial", because after competent counsel were duly appointed their motion for continuance was denied. Vigilant concern for the maintenance of the constitutional right of an accused to assistance of counsel led us to grant certiorari.[2]

Had petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required reversal of his conviction.[3] But counsel were duly appointed for petitioner by the trial court as required both by Alabama law[4] and the Fourteenth Amendment.

Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts

[1] — Ala. —, 188 So. 391.

[2] — U. S. —.

[3] Powell v. Alabama, 287 U. S. 45; see Brown v. Miss., 297 U. S. 278, 286.

[4] Code of Ala., 1923, Sec. 5567.

then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.[5]

But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.[6] The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

In determining whether petitioner has been denied his constitutional right to assistance of counsel, we must remember that the Fourteenth Amendment does not limit the power of the States to try and deal with crimes committed within their borders,[7] and was not intended to bring to the test of a decision of this Court every ruling made in the course of a State trial.[8] Consistently with the preservation of constitutional balance between State and Federal sovereignty, this Court must respect and is reluctant to interfere with the States' determination of local social policy.[9] But where denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness[10] demands that we scrupulously review the record.[11]

The record shows—

Petitioner was convicted on an indictment filed in the Bibb County Circuit Court for murder alleged to have occurred in 1932. He was found and arrested in Pittsburg, Pennsylvania, shortly before March 21, 1938. On that date, Monday, he was arraigned at a regular term of the Court; two practicing attorneys of the local bar were appointed to defend him; pleas of not guilty and not guilty

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[5] Franklin v. South Carolina, 218 U. S. 161, 168; Isaacs v. United States, 159 U. S. 487, 489; see Minder v. Georgia, 183 U. S. 559, 561.

[6] Cf. Powell v. Alabama, *supra*; Moore v. Dempsey, 261 U. S. 86, 91.

[7] Leeper v. Texas, 139 U. S. 462, 467-8; Ughbanks v. Armstrong, 208 U. S. 481, 487; Minder v. Georgia, *supra*, 562.

[8] Cf. Davidson v. New Orleans, 97 U. S. 96, 104; Walker v. Sauvinet, 92 U. S 90, 92.

[9] Green v. Frazier, 253 U. S. 233, 239, 240, 242; Nebbia v. New York, 291 U. S. 502, 537-8.

[10] Cf. Lewis v. United States, 146 U. S. 370, 374, 375.

[11] Norris v. Ala., 294 U. S. 587, 590; Pierre v. Louisiana, 306 U. S. 354, 358.

by reason of insanity were entered and the presiding judge set his trial for Wednesday, March 23. The case was not reached Wednesday, but was called Thursday, the 24th, at which time his attorneys filed a motion for continuance, on the ground that they had not had sufficient time and opportunity since their appointment to investigate and prepare his defense. Affidavits of both attorneys accompanied the motion.

One attorney's affidavit alleged that he had not had time to investigate and prepare the defense because he had been actually engaged in another trial from the time of his appointment at 2 P. M., Monday, until 9 P. M. that evening; his presence had been required in the court room on Tuesday, March 22, due to employment in other cases set, but not actually tried; he had been detained in court Wednesday, March 23, waiting for petitioner's case to be called; but after his appointment he had talked with petitioner and "had serious doubts as to his sanity."

The affidavit by the other attorney stated that he too had not had proper time and opportunity to investigate petitioner's case because of his employment in other pending cases, some of which were not disposed of until Tuesday at 4:30 P. M.

No ruling on the motion for continuance appears in the record, but on Thursday, the 24th, the trial proceeded before a jury.

The foster parents of the person whose murder was charged and another witness testified that on the day of the killing, deceased, petitioner's wife from whom he was then separated, had started to a nearby neighbor's house to get a washtub when petitioner approached her with a pistol in his right hand; words ensued; she turned and ran and he shot her twice in the back; she fell and he shot her three more times. Petitioner denied that these witnesses were at the time in a position to see what occurred. Admitting he had come some three miles from his home to see his wife, he insisted that he had no pistol but that when he spoke to her she had a bucket of water and someting else; they quarrelled; she then drew a pistol from under her sweater and he "got to tussling with her over the pistol, trying to take it away from her"; "shot her, behind the shoulder, and through the back, tussling with her," and then ran away. There is no suggestion in the record that there were any witnesses to the killing other than those who testified. The plea of insanity apparently was withdrawn.[12]

[12] The opinion of the Supreme Court of Alabama notes: "Counsel first interposed a plea of not guilty, and another of not guilty by reason of insanity. But upon the trial withdrew the latter plea."

The jury returned a verdict of guilty with the death penalty. On the same day, the 24th, petitioner's counsel moved for new trial, setting up error in the failure to grant the requested continuance. This motion for new trial was continued from time to time until June 30. In the interim, a third attorney had been employed by petitioner's sister, and on June 30, petitioner's three lawyers filed an amendment to the motion for new trial, specifically setting out that the denial of a continuance had deprived petitioner of the equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment, by denying him "the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial."

When the motion for new trial was heard the only witnesses were petitioner's three attorneys. The third attorney, employed by petitioner's sister, testified only that he had been employed after the trial and verdict. The two attorneys who had represented petitioner at the trial substantially repeated what they had set out in their original affidavits. In some detail they testified that: they had conferred with petitioner after their appointment on Monday, March 21, but he gave them no helpful information available as a defense or names of any witnesses; between their appointment and the trial they made inquiries of people who lived in the community in which the petitioner had lived prior to the crime with which he was charged and in which the killing occurred and none of those questioned, including a brother of petitioner, could offer information or assistance helpful to the defense; they (the attorneys) had not prior to the trial conferred with local doctors, of whom there were four, as to petitioner's mental condition, had neither summoned any medical experts or other witnesses nor asked for compulsory process guaranteed an accused by the Alabama Constitution, Art. 1, Sec. 6. And in response to inquiries made by the trial judge they stated that they had not made any request for leave of absence from the court to make further inquiry or investigation.

The motion for new trial was overruled.

Upon appeal, the Alabama Supreme Court gave full consideration to the motion for continuance although no ruling upon it was contained in the record and concluded that the trial court had not abused its discretion in failing to continue the case.[13]

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[13] Avery v. State of Alabama, *supra*.

Under the particular circumstances appearing in this record, we do not think petitioner has been denied the benefit of assistance of counsel guaranteed to him by the Fourteenth Amendment. His appointed counsel, as the Supreme Court of Alabama recognized, have performed their "full duty intelligently and well." Not only did they present petitioner's defense in the trial court, but in conjunction with counsel later employed, they carried an appeal to the State Supreme Court, and then brought the matter here for our review. Their appointment and the representation rendered under it were not mere formalities, but petitioner's counsel have—as was their solemn duty—contested every step of the way leading to final disposition of the case. Petitioner has thus been afforded the assistance of zealous and earnest counsel from arraignment to final argument in this Court.

The offense for which petitioner was convicted occurred in a County largely rural. The County seat, where court was held, has a population of less than a thousand.[14] Indictments in the Bibb County Circuit Court, as in most rural Counties throughout the Nation, are most frequently returned and trials had during fixed terms or sessions of court.[15] And these rural "Court Weeks" tra-

[14] Vol. I, Fifteenth Census of the United States, 1930.

[15] The first Constitution of Alabama (1819), Art. V, Sec. 7, provided for the holding of a circuit court at least twice a year in each county, and this provision continues in the present constitution, Const. of Ala. (1901) Art. VI, Sec. 144. While in recognition of modern social needs (see Pound, Criminal Justice in America, 1930, pp. 152, 88, 150, 163, 164, 178, 183, 189, 190) circuit courts now, by statute, entertain causes at substantially all times (Code, 1923, Sec. 6667, as amended) the holding of formal court at specific terms or sessions is emphasized in the requirement that each cause be called at least twice a year and as often as is necessary to secure prompt trials. (*Id.*, Sec. 6668). Cf. Ala. Civ. Code, 1907, c. 62, Art I, Sec. 3234, specifically providing for holding of circuit court in Bibb County on the first Monday before the last Monday in February and August of each year. In general, the practice in Alabama accords with that in all sections of the country, e. g., see Compiled Laws of Colorado, 1921, Sec. 5656, *et seq.*, fixing specific terms of district courts, and Sec. 5734-5766, fixing specific dates of county court terms; Idaho Code Ann. (1932) 1-706, *et seq.*, requiring at least two terms each year for the district court in each county, to be fixed by court order; Burns Indiana Stat. Ann. (1933) 4-332, *et seq.*, fixing specific terms of circuit courts, 4-407 *et seq.*, and 4-607, fixing specific terms of superior courts; Rev. Stat. of Maine (1930), c. 91, Sec. 21, p. 1264, fixing specific trial terms for superior courts; Mich. Stat. Ann. (Callaghan, 1938) § 27.546, *et seq.*, providing for at least four terms of circuit court in each county organized for judicial purposes, at fixed times subject to change by court order (§ 27.547); Cahill's Consol. Laws of New York (1930), c. 31, § 84, providing that special and trial terms of supreme court be designated by the appellate division (see also § 150) and requiring that at least one special term and two trial terms must be held in each county annually, § 148; Rev. Stat. of Utah (1933), 20-3-6, 20-3-9, requiring at least three terms during each year for the district court at each county seat, at times to be

ditionally bring grand and petit jurors, witnesses, interested persons and spectators from every part of the County into the County seat for court.[16] Unlike metropolitan centers, people in these rural Counties know each other, and information concerning witnesses and events is more widespread and more generally known than in large cities. Because this was so, petitioner's attorneys were able to make the inquiries during Court Week at the County seat, to which they testified, and that they apparently withdrew the plea of insanity after this inquiry is significant. That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted.

Under the circumstances of this case we cannot say that the trial judge, who concluded a fairly conducted trial by carefully safeguarding petitioner's rights in a clear and fair charge, deprived petitioner of his constitutional right to assistance of counsel. The Supreme Court of Alabama having found that petitioner was afforded that right, its judgment is

Affirmed.

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fixed by the respective district judges; Public Laws of Vermont (1933), Sec. 1374, p. 296, fixing stated terms for holding county courts. In Pennsylvania, courts of quarter sessions, "of oyer and terminer and jail delivery shall be holden four times, annually, in every county." 17 Purdon's Penn. Stat., §§ 331, 351, 371.

[16] The system of circuit court terms continues today characteristics traceable to the original English Assizes. While financial and administrative matters have been dropped from the business historically committed to justices on Eyre and later to judges of assize from the time of Henry II, our rural County Circuit courts still bear the earmarks of a "general review of the whole administration of the country." I Stephens, "His. of the Crim Law of Eng." (London), pp. 101, 106, 111, See, II Enc. of Soc. Sci., 283, 284, IV, 522. And the practice of promptly trying at any term all the then accused finds its historical roots in the commissions of gaol-delivery oyer and terminer of judges on Circuit or "Assize." I Stephen, *supra*, p. 105, *et seq.* These judges were empowered "to try every prisoner in the gaol, committed for any offense whatsoever." They proceeded upon prior indictments "as well as upon indictments taken before themselves." Stubbs's "Crown Circuit" (Dublin), 2, 5, 7, 9, 10. "And therefore it hath never been a question, but that the justices of gaol-delivery may take an indictment, try, and give judgment the same day." 2 Hale's "Pleas of the Crown" (1st Amer. ed.), 33. The Sheriff was commanded to see that the prisoners "together with their attachments, indictments, and all other muniments any ways concerning those prisoners . . . [be present and that] all they, who will prosecute against those prisoners, be then and there to prosecute against them, as shall be just." Stubbs, *supra*, 4, 5. See 1 Holdsworth's "History of English Law" (1927), pp. 49-51, 264 *et seq.*